APPEAL NO. 93452

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp 1993). On April 6, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that claimant abandoned medical treatment but had disability from October 3, 1991, to the date of the hearing. Appellant (carrier) asserts that no finding of disability was made, that the conclusion of law saying claimant had disability was not based on medical evidence and is against the great weight of the evidence because claimant had revenue from a business, because claimant assisted in the operation of that business, and because claimant did not show that he was unable to obtain and retain employment at wages equivalent to the pre-injury wage. Respondent (claimant) did not reply.

DECISION

We affirm.

The issues at the contested case hearing were whether claimant has disability and whether claimant abandoned medical treatment.

Article 8308-6.42(c) of the 1989 Act states that the Appeals Panel shall determine each issue on which review was requested. The carrier asserts two issues on appeal: (1) the hearing officer made no finding of fact in regard to disability, and (2) the hearing officer's conclusion of law that the claimant has disability is not based on medical evidence and is against the great weight and preponderance of the evidence.

The Appeals Panel determines:

That the absence of a finding of fact directly relating to disability is not reversible error because the decision is consistent with such a finding and one can be implied from the other findings of fact and evidence of record.

That the conclusion of law that claimant had disability from October 3, 1991, through the date of hearing is sufficiently supported by the evidence.

Claimant had worked for (employer) since September 30, 1991, when he injured his shoulder, neck, and back on (date of injury), while tightening an overhead nut. He was on a ladder, three feet off the ground, and almost slipped, twisted, and caught himself from falling. He received temporary income benefits until suspended by the benefit review officer on October 26, 1992.

Claimant saw (Dr. S) as his treating doctor from October 10, 1991, through July 31, 1992; his visits in 1992 were widely separated. Nevertheless, Dr. S, on July 31, 1992, stated that claimant was "unable to return to work at this time," a statement that Dr. S regularly made in regard to claimant. In June 1992, claimant moved to (city), Texas, from

(city), Texas. He stated that he tried to obtain a physician in (city) but doctors were reluctant to accept him when he told them his income benefits had been cut off. (Claimant acknowledged that his medical benefits were not curtailed, but said he could not convince doctors he approached of this.)

The issue of abandonment of medical care was not appealed and will not be discussed further.

Although findings of fact are made in contested case hearings, the Appeals Panel has allowed implied findings to support the decision when sufficient evidence exists to support them. *See* Texas Workers' Compensation Commission Appeal No. 91002, decided August 7, 1991; compare to Texas Workers' Compensation Commission Appeal No. 93150, decided April 14, 1993, in which findings were not implied because of lack of evidence. The Appeals Panel has not required extensive findings of fact under the 1989 Act. *See* Texas Workers' Compensation Commission Appeal No. 93147, decided April 12, 1993. A finding was made that claimant's doctor noted him to be unable to work which provides some support for a conclusion of law as to disability. In addition, an implied finding of fact that the claimant had disability, consistent with the conclusion of law pertaining to disability, can be made.

The carrier states that there was no medical evidence to support the conclusion of law as to disability. This assertion is without merit; claimant's treating doctor from October 10, 1991, through July 31, 1992, said that claimant was unable to work. In addition, Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992 (citing Director, State Emp. Wkrs. Comp. v. Wade, 788 S.W.2d 131 (Tex. App.-Beaumont 1990, writ denied)) stated that the claimant's testimony can support a decision as to disability.

Carrier also asserts that the decision should be reversed because the conclusion as to disability is against the great weight and preponderance of the evidence in that claimant had revenue from an ice cream business. Texas Workers' Compensation Commission Appeal No. 92584, decided December 14, 1992, (citing Texas Workers' Compensation Commission Appeal No. 92021, decided March 9, 1992) stated that income from a business is not "wages." Since revenue is not "wages," which is required as part of the definition of "disability," claimant's revenue from the business has no effect upon disability. *See also* Article 8308-1.03(47).

Carrier next proposes a great weight of the evidence argument based on claimant's work in the operation of the business. The carrier provided evidence at the hearing that claimant did sell one or more ice cream bars from a truck he owned. The evidence also showed that claimant helped another person move an ice chest from a truck to an ice cream truck and helped a relative work on a house. In addition, one witness, (LM), indicated that claimant "occasionally" drove an ice cream truck (and later said the driving was "numerous" times), admitted to her that he drove an ice cream truck in the (city) area, and stated to her that he already had his injury before beginning work for employer. LM said she would not trust claimant. Claimant, however, testified that he could work for up to about an hour and

then his back gets too bad to continue. He stated he had looked for a job, but was turned down when the prospective employer learned of his injury. He named one prospective employer who replied in that manner. Claimant did obtain a permit for one of his trucks during this period. He said that he primarily was advising his relative regarding construction when he worked on the house. As stated in Appeal No. 92167, *supra*, disability is a fact question for the trier of fact, the hearing officer, to decide. The conclusion as to disability is not so against the great weight and preponderance of the evidence as to result in an unjust decision. (We note that there is no issue as to compensability of the injury itself before us.)

Carrier also contends that the decision is against the great weight of the evidence because the claimant did not show that he was unable to obtain and retain employment. This assertion also is without merit. Claimant testified that he tried to get another job but was turned down because of his injury. The hearing officer is the sole judge of the weight and credibility of the evidence (*See* Article 8308-6.34(e) of the 1989 Act) and could believe the claimant even though he is an interested party to the hearing. *See* Highlands Ins. Co. v. Baugh, 605 S.W.2d 314 (Tex. Civ. App.-Eastland 1980, no writ). In addition, Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991, states that" an unconditional medical release to return to full duty does not, in and of itself, end disability." (emphasis added). That opinion added that with an unconditional medical release, the claimant then has "the burden to show that disability is continuing." The case on appeal shows that the last medical report states the contrary in saying that claimant has not been released to return to work. The claimant's efforts in regard to seeking employment do not require a determination that disability has not continued.

Carrier does not appeal by asserting that a finding of abandonment of medical treatment requires that no temporary income benefits be paid.

The decision and order are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge